UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LORI JO VINCENT, RUTH ANN GUTIERREZ, and LINDA U. GARRIDO, and JOHN GARRIDO, on behalf of themselves and all others similarly situated, Plaintiffs, -- against -- THE MONEY STORE, TMS MORTGAGE, INC., HOMEQ SERVICING CORP., and MOSS, CODILIS, STAWIARSKI, MORRIS, SCHNEIDER & PRIOR, LLP, Defendants.	:	Case No. 03 Civ. 2876 (JGK)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION FOR LEAVE TO AMEND ANSWER BY DEFENDANT MOSS, CODILIS, STAWIARSKI, MORRIS, SCHNEIDER & PRIOR LLP

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PRELIMINARY STATEMENT

Plaintiffs, on behalf of themselves and other putative class members similarly situated, submit this memorandum of law in opposition to the motion for leave to amend their Answer filed by defendant Moss, Codilis, Stawiarski, Morris, Schneider & Prior LLP ("Moss Codilis"). The motion seeks leave to amend ¶ 23 of the Answer to change what is described as a "typographical" error in which Moss Codilis admits that a non-attorney, Christiana Nash, supervised its Breach Letter Program during the time period that the default letters at issue here were disseminated.

The import of the proposed amendment is to make a 180-degree about face from the sworn testimony of Christina Nash, Moss Codilis' Rule 30(b)(6) deponent, on this issue, as well as the terms of its own policy manual, and the factual admissions of its own client, Money Store. See Declaration of Neal A. DeYoung, dated December 12, 2010 ("DeYoung Decl."), Exh. M (Money Store Rule 56.1 Statement in Support of Summary Judgment, dated May 7, 2003, para. 18) ("Christian Nash of Moss Codilis…oversaw the administrative handling of the debtor accounts with the help of paralegals working under her supervision.") (Citing extensively to the Nash deposition testimony). The Complaint alleges, and Moss Codilis admits, in paragraph 23 of their Answer, that 89,000 default or breach letters were issued between April 1997 and November 2000:

> 22. Upon information and belief, Moss Codilis disseminated approximately 89,000 Breach Letters during the time period from April 1997 through November 2000.
>
> **ANSWER:** Admitted.
>
> 23. Despite the impression created by the letters on Moss Codilis' law firm stationary, **these letters** were generated by computers or lay persons, and overseen by an attorney who was

> not licensed in the state from which the Breach Letters originated and thus had no right to practice law in the State of Colorado.
>
> **ANSWER:** Moss Codilis denies that the form of the letter used was generated by a computer. Moss Codilis admits that **the letters at issue in this case** were printed by a computer, and that the process by which the files were received from the Money Store by Moss Codilis and by which the information received was used to create and send the default notices **was, during *the* portion of time in which Moss Codilis was preparing and sent out default notices for The Money Store, overseen by someone who was not licensed to practice law, and who was not permitted to practice law in the State of Colorado.**

Moss Codilis Answer, DeYoung Decl., Exh. A, p. 12, ¶23 (emphases added). The Answer admits that the Breach Letter Program from April 1997 to November 2000 was "overseen" by Christina Nash who, admittedly, was not licensed to practice law during this time. By changing the phrase "the portion of time" to "a portion of time" in ¶23, Moss Codilis attempts to insinuate that Valerie Bromley, a licensed attorney, took over as Supervisor of the Breach Letter Program in 1999. See, Nash Decl. at ¶9. The record, including Nash's uncontroverted and binding Rule 30(b)(6) deposition testimony, Moss Codilis' own written policies in 2000, and the admissions of Money Store, Moss Codilis' own client, amply refutes this newly minted assertion and is instead entirely consistent with the unamended ¶23 containing the proper judicial admission. Leave to amend should be denied where it would be futile, in bad-faith or run afoul of the undisputed factual record. Here, the undisputed record evidence is so clear that the proposed amendment would be subject to being stricken under Rule 12(f), even if leave were granted.

ARGUMENT

I. Leave To Amend Paragraph 23 Would Be An Exercise In Futility Because It Runs Afoul Of The Undisputed Record Which Would Remain Binding On Moss Codilis.

The only evidence cited by Moss Codilis in support of its proposed amendment is (1) the Nash Declaration and (2) a reference to page 43 of her deposition under Rule 30(b)(6). Neither of them offer any support for Moss Codilis' newly minted theory for amending its Answer. Granting leave to amend would be improper where the proposed amendment flies in the face of undisputed record evidence.

In Harris Corp. v. McBride & Assocs., 2002 U.S. Dist. LEXIS 13342 (W.D.N.Y. Jul. 19, 2002), leave to amend an answer containing a judicial admission was denied where, as here, defendant offered no evidence to create a genuine issue of triable fact regarding undisputed evidence supporting the admission. See also, Bank of Am., N.A. v. Farley, 2001 U.S. Dist. LEXIS 21676, at *6 (S.D.N.Y. Dec. 28, 2001) (denying leave to amend Answer where such amendment would contradict admission of the existence of the contract contained in initial Answer). Those principles compel denial of leave to amend in the case at bar where there is no evidence in support of the proposed amendment apart from the Nash Declaration which must be disregarded as contrary to her own sworn deposition testimony under Rule 30(b)(6). See also Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987) ("It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment."). The Second Circuit has affirmed the imposition of sanctions where allegations were included in a proposed amended complaint that had already been contradicted by the plaintiff's sworn deposition testimony. Levine v. Federal Deposit Ins. Corp., 2 F.3d 476, 478 (2d Cir. 1993).

A. NASH'S RULE 30(B)(6) DEPOSITION

While Nash did testify that Valerie Bromley joined the Breach Letter Program in 1999, she testified that she was unsure of the actual date and never indicated that Bromley took over any of her supervisory responsibilities or otherwise managed the Breach Letter Program. (DeYoung Decl. Exh. B, at p. 43). Nash clearly identifies herself as the Supervisor of the Breach Letter Program as of 2000:

> **Q.** Right. But you said this was created – "this" meaning Plaintiffs' 6 –
> **NASH:** 2000.
> **Q.** – was created, I believe you said, in the –
> **NASH:** Spring of 2000.
> ***
> **Q.** And who would the processors have been at this point?
> **NASH:** I know Emily Todd was still there. Jessica Stimson may have been there for part of the time, but I'm not sure. And Cindy Crandall.
> **Q.** Who's the breach letter supervisor?
> **NASH:** That was myself.

(DeYoung Decl. Exh. B, at p. 133-135). Nash testified that she went on maternity leave at the "end of November 2000." Id. at p. 153. She also testified that she continued to work reviewing loans and letters as a supervisor of the Breach Letter Program until she went on leave in November of 2000. Id. at pp. 202-4. When asked to recall whether she ever spoke to another Moss Codilis attorney about issues which arose in response to calls received from debtors or their attorneys, Nash had no recollection of speaking to another attorney, much less having Bromley take over as her supervisor for more than a year before she left on maternity leave:

> Q. … [Y]ou wouldn't call someone at Moss, Codilis?
> **NASH:** I might. I might call one of the partners if that was an issue. Sure.
> Q. Is that something you did?
> **NASH:** I did probably on some accounts. I don't know.
> Q. Do you have any specific recollection as to whether you did?
> **NASH:** No.

(DeYoung Decl. Exh. B, at pp. 185-86).

B. THE NASH DECLARATION

Moss Codilis now suggests, through the Nash Declaration, that Bromley took over as Nash's superior and Breach Letter Supervisor in 1999. "[J]ust as the court should not accept an affidavit that contradicts deposition testimony, it should also not allow inconsistent allegations made in a [pleading] to defeat summary judgment in the face of contradictory testimony either." AB v. Rhinebeck Cent. Sch. Dist., 361 F. Supp. 2d 312, 316 (S.D.N.Y. 2005)(court may not "simply disregard [defendant's] earlier sworn testimony in favor of inconsistent post hoc statements prepared for purposes of this lawsuit."), *citing*, Better Env't, Inc. v. ITT Hartford Ins. Group, 96 F. Supp. 2d 162, 168 (S.D.N.Y. 2000).

Nash also testified that she was the "Breach Letter Supervisor" (not Valerie Bromley) pursuant to Moss Codilis' own Breach Letter Policies and Procedure, a document which she created in April or May 2000. DeYoung Decl., Ex. B, pp. 129, 133, 151, 153. Under those Breach Letter Policies and Procedures, Nash was required to review Money Store breach letters unless she was unavailable. DeYoung Decl. Exh. N, p. 13; Exh. B, pp. 153-55. Nash now asserts in her Declaration that her involvement in the Breach Letter Program after October 1999 was "extremely limited" and that she had no involvement "in the review of any individual loan files or Breach Letters in any way[.]" (Nash Decl., ¶9). At her deposition, Nash testified that she reviewed "a significant amount of the letters" sent out by Moss Codilis on Money Store's behalf in 2000, certainly "***more than*** 1,000." DeYoung Decl. Exh. B, p. 152.

Leave to amend should be denied where the evidence offered in support of the proposed amendment fails to create an issue of fact. See, Milanese v. Rust-Oleum Corp., 244 F.3d 104, 110 (2d Cir. 2001)("even if the amended complaint would state a valid claim on its face, the court may deny the amendment as futile when the evidence in support of the plaintiff's proposed new claim creates no triable issue of fact").[1]

II. Even If Leave To Amend Is Granted, The Proposed Amendment Would Be Subject To Being Stricken Under Rule 12(f).

Even if leave to amend were granted, the proposed amendment could not survive a motion to strike under Rule 12(f). Given Nash's binding deposition testimony under Rule 30(b)(6) which forecloses the possibility of contradictory post-hoc statements being submitted in support of the proposed amendment (such as the Nash Declaration), a Rule 12(f) motion to strike the amendment would have to be granted. The Second Circuit has held that a Rule 12(f) motion to strike should be granted where "no evidence in support of the allegation would be admissible." Lipsky v. Commonwealth United Corp., 551 F.2d 887, 893 (2d Cir. 1976). That is precisely the situation here.

Moss Codilis does not dispute that Nash's deposition testimony is binding upon them for the purposes of this case. Def. Summ. Judg. Br. at 5 ("Moss Codilis acknowledges the admissibility of that deposition here."). At Nash's deposition, Moss Codilis' own counsel stipulated that she was produced as a witness pursuant to Rule 30(b)(6) to testify on its behalf. See, DeYoung Decl., Ex. B, p. 6. "A deposition pursuant to Rule 30(b)(6) is substantially different from a witness's deposition as an individual. A 30(b)(6) witness testifies as a representative of the entity, his answers bind the entity and he is responsible for providing all the relevant information known or reasonably available to the entity." Twentieth Century Fox Film Corp. v. Marvel Enters., 2002 U.S. Dist. LEXIS 14682, *6 (S.D.N.Y. Aug. 6, 2002), *quoting*, Sabre v. First Dominion Capital, LLC, 2001 U.S. Dist. LEXIS 20637, 2001 WL 1590544 at *1 (S.D.N.Y. Dec. 12, 2001). The binding effect of Rule 30(b)(6) testimony "is necessary in order to make the deposition a meaningful one and to prevent the 'sandbagging' of an opponent by conducting a half-hearted inquiry before the deposition but a thorough and vigorous one before the trial." Id.

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[1] Moss Codilis' reference to Anthony v. City of New York, 339 F.3d 129, 138 (2d Cir. 2003) is misplaced. Unlike herein, the Anthony defendants were not seeking leave to obtain a 180-degree reversal of an admission pled in an answer filed prior to a summary judgment application. Rather, the Anthony defendants had failed to raise the affirmative defense of qualified immunity until they moved on such ground through a motion for summary judgment. The lower court in its discretion construed the pending motion as also one to amend their answer to include such a defense. Id. Courts recognize the patent difference where, as here, a party seeks to avoid a potentially adverse decision by reversing an admission made in its pleadings filed prior to a fully briefed motion for summary judgment. See Reisner v. GM Corp., 511 F. Supp. 1167, 1172 (S.D.N.Y. 1981), aff'd, 671 F.2d 91(2d Cir. 1982) ("[T]he view of the proposed pleading as an attempt to forestall a ruling [ ] on a motion for summary judgment is not incredible. Such a motivation for a new complaint would clearly justify denial of permission to file it.")

Amendment of paragraph 23 would not change the fact that Moss Codilis remains bound by its own Rule 30(b)(6) designees' testimony and its Breach Letter Policies and Procedure. Accordingly, Nash's deposition testimony is binding on Moss Codilis and would preclude the admission of the conclusory Nash Declaration to support a contrary position.

Moreover, the proposed amendment would remain contradicted by the admission in the original, un-amended Answer. The rule in this Circuit is that, "[w]hen a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extrajudicial admission made by a party or his agent." Strategic Mktg. & Communs. v. Kmart Corp., 41 F. Supp. 2d 268, 272 (S.D.N.Y. 1998); Dweck v. Pacificorp Capital, Inc., 1998 U.S. Dist. LEXIS 2210 (S.D.N.Y. Feb. 16, 1998)(superseded pleadings, while not judicial admissions per se, may be introduced as evidence and considered an admission.).

Following Ms. Nash's deposition, Moss Codilis' own client, Money Store moved for summary judgment on the FDCPA claim, relying extensively on Nash's testimony. In its Rule 56.1 Statement in Support of Summary Judgment, Money Store asserted as an "undisputed fact" that Christina Nash was the person at Moss Codilis who oversaw the breach letter program and made the "legal determinations":

> 18. Christina Nash of Moss Codilis performed these tasks; she made the legal determinations involved and oversaw the administrative handling of the debtor accounts with the help of paralegals working under her supervision.

(Rule 56.1 Statement, DeYoung Decl. Exh. M, p. 4). Permitting Moss Codilis leave to amend paragraph 23 would put its pleadings in direct conflict with the factual admission of its own client, Money Store. Leave to amend should be denied where it appears that the proposed amendments are "unlikely to be productive[.]" Ruffolo v. Oppenheimer & Co., 987 F.2d 129, 131 (2d Cir. 1993); see also Kaster v. Modification Sys., Inc., 731 F.2d 1014, 1018 (2d Cir. 1984) ("That the amendments would not serve any purpose is a valid ground to deny a motion for leave to amend.").

CONCLUSION

For each of the foregoing reasons, plaintiffs respectfully submit that the request for leave to amend should be denied as being without merit and thereby futile, and for the independent reason that the proposed amendment would not survive a Rule 12(f) motion to strike.

Dated: New York, New York
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Respectfully submitted,

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